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No. 02-1610

IN THE

Supreme Court of the United States

JILL JACOBY, SUPERINTENDENT OF BETHEL SCHOOL DISTRICT, *ET AL.*,

Petitioners,

v.

TAUSHA PRINCE, A MINOR, BY AND THROUGH HER PARENTS, JAMES PRINCE AND KIMBERLY PRINCE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Do the First and Fourteenth Amendments to the U.S. Constitution forbid the viewpoint-discriminatory denial of benefits and privileges to a student Bible club in a public high school?

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INTRODUCTION

The petitioner Bethel School District offers a range of benefits and privileges to such noncurricular student clubs as the Heritage Club, Students Against Drunk Driving, and the Stock Market Club. Pet. at 17; Clerk's Record (CR) Tab 25, p. 2. Respondent Tausha Prince seeks no more and no less than *equal* treatment for her student Bible club. The Ninth Circuit correctly upheld her right to equal access, in pertinent part, under the First and Fourteenth Amendments.

This Court's equal access cases have already answered all of the legal issues presented here. *See Board of Education v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). Petitioners identify no circuit conflicts as an alternative basis for review. This Court should deny certiorari.

STATEMENT

Petitioner Bethel School District offers two tiers of noncurricular student clubs at Spanaway Lake High School (Spanaway). Clubs in the first tier -- Associated Student Body (ASB) clubs -- enjoy the ability to meet after school along with other privileges such as a free appearance in the yearbook, access to various school bulletin boards, and use of certain school supplies. Clubs in the second tier -- District Policy 5525 (5525) clubs -- can meet after school but are not given the same benefits as ASB clubs.

Religious clubs are categorically excluded from eligibility for the ASB tier; instead, religious clubs are relegated to the second-class status of the 5525 tier.

Respondent Tausha Prince, a student at Spanaway, sought recognition of the World Changers (originally World Leaders) Bible club as an ASB group. Petitioners refused, citing Establishment Clause concerns. Prince sued in federal court, challenging the school district's discrimination against religious student clubs under, *inter alia*, the Equal Access Act (20 U.S.C. §§ 4071-74), the Free Speech Clause of the First Amendment, and the Free Exercise Clause of the First Amendment.

The district court ruled in favor of the school district, but the Ninth Circuit reversed.

The three-judge appeals court:

1. Unanimously held that the federal Equal Access Act (EAA) requires equal access for religious student clubs to the following benefits, to the same extent that those benefits are afforded to all ASB clubs:
   - free participation in an annual craft fair,
   - eligibility for conducting fundraising activities such as candy sales and car washes,
   - free participation in school auctions,
   - free appearance in the school yearbook, and
   - use of the school public address system and school bulletin boards to publicize their activities, Pet. App. 18a-23a, 39a, 44a; and,
2. Unanimously held that the Establishment Clause did not require discrimination against religious clubs regarding these benefits, Pet. App. 14a-18a, 39a, 44a.

Importantly, petitioners *do not* challenge these holdings in their petition for certiorari.

The court below held that the remaining ASB benefits at issue -- the ability of ASB clubs to meet during "student/staff time"

(SST),[1] and the ability of ASB clubs to use school supplies, audio/visual equipment, and school vehicles -- were beyond the scope of the rights protected under the EAA, Pet. App. 23a-29a. As to these particular ASB club privileges, then, the court of appeals:

3. Unanimously held that the school district's denial of equal access to these benefits for religious student clubs constituted viewpoint discrimination contrary to the Free Speech Clause, Pet. App. 30a-34a, 39a, 44a; and,
4. By a 2-1 vote, held that the Establishment Clause did not require discrimination against religious clubs regarding these benefits, Pet. App. 34a-39a. *Compare* Pet. App. 44a-45a (Berzon, J., concurring in part and dissenting in part).

In this Court, petitioners challenge only the last of these holdings (#4 *supra*).[2]

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[1]"Student/staff time" (SST) is a scheduled period during the school day, like study hall. No subject is taught; rather, students have a variety of options for using this period, including participating in noncurricular student club meetings, doing homework, receiving tutoring from a teacher, and attending school assemblies. Pet. App. 24a. Petitioners conceded that no academic credit is given for SST. CR Tab 22, p. 98. Moreover, the choice of activity belongs to the student. CR Tab 22, pp. 76-79. Contrary to petitioners' unsupported assertion, no student is "required to attend religious meetings," Pet. at 10. Nor does affording *equal* access to a Bible club require other activities to "give way," *id.*

[2]In one sentence at the very end of their petition, petitioners contest, in passing, the Ninth Circuit's unanimous holding that the school district engaged in viewpoint discrimination (#3 *supra*). Pet. at 18. This throwaway sentence cannot be taken seriously. The only basis petitioners give for denying that petitioners engaged in viewpoint discrimination is their contention that because the school district's discrimination applies to "all" religious groups, it "cannot be considered viewpoint discriminatory." This Court, however, has expressly rejected this very argument. *Lamb's Chapel*,

(continued...)

ARGUMENT

This Court's "equal access" jurisprudence has already answered all of the legal issues presented here. Hence, there is no basis for review.

The Ninth Circuit held that the Establishment Clause does not require, and indeed the Free Speech Clause prohibits, the discriminatory denial of *equal* access by religious student clubs to various benefits and privileges (viz., certain meeting time slots and the use of school supplies, equipment, and vehicles) already offered to other noncurricular student clubs. Under this Court's precedents, from *Mergens* to *Good News*, this conclusion is wholly unremarkable.

None of the aspects of this case that petitioners point to identify anything new that might warrant review.

-- That the underlying litigation involves an Equal Access Act claim, Pet. at 6-8, 12-14, is irrelevant: petitioners *do not challenge* in this Court any aspect of the Ninth Circuit's holdings regarding the scope, meaning, or constitutionality of that federal statute.[3]

-- That the court below recognized First Amendment rights independent of the EAA, Pet. at 4, 8, 12, 14, is nothing new: this Court did the same in *Good News*. In that case, this Court applied equal access norms to an *elementary*

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[2](...continued)
508 U.S. at 393 ("That all religions and all use for religious purposes are treated alike . . . does not answer the critical question whether it discriminates on the basis of viewpoint . . ."); *Rosenberger*, 515 U.S. at 831-32 (discrimination against all religious speech is still viewpoint based).

[3]Petitioners erroneously suggest that the EAA affirmatively prohibits equal access to the benefits and privileges at issue here. Pet. at i, 5. To the contrary, while the EAA does not itself authorize equal access to these benefits (according to the court below), it in no way *forbids* access to such benefits. *See* Pet. App. 62a-65a (text of EAA).

school, while the EAA applies only to *secondary* schools, 20 U.S.C. § 4071(a) (Pet. App. 62a). *See also* 533 U.S. at 118 n.8 (rejecting argument that EAA places ceiling on equal access rights).

-- That the SST period occurs during the schoolday and not after school, Pet. at 5, 8-12, is irrelevant to the constitutionality of equal access under the Establishment Clause. The crucial question is rather whether the other, nonreligious student groups are allowed to meet at that same time. *Good News*, 533 U.S. at 114 n.5 (equal access required "for any time" generally made available to other groups). Even making government resources available for use *in the classroom for conveying religious messages* is permissible under the Establishment Clause, *e.g.*, *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (government-paid interpreter for hearing-impaired student in religious schools), so long as the benefit is not skewed toward religion.[4] *A fortiori*, merely allowing a Bible club to meet at the same time that the Stock Market Club can meet presents no significant Establishment Clause issue.

-- That government supplies and vehicles that are made neutrally available might be used for religious purposes as a consequence of the choices of private actors, Pet. at 12-14, presents no Establishment Clause concerns, much less a new question warranting review. *E.g.*, *Everson*

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[4]Petitioners, Pet. at 9-10, rely heavily upon *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), but *McCollum* does not preclude *equal* access rights. "Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but *not* by others." *Widmar v. Vincent*, 454 U.S. 263, 271 n.10 (1981) (distinguishing *McCollum*) (emphasis in original).

v. Board of Educ., 330 U.S. 1 (1947) (use of government buses); *Agostini v. Felton*, 521 U.S. 203 (1997) (use of government remedial education services); *Zelman v. Simmons-Harris*, 563 U.S. 639 (2002) (use of taxpayer funds).[5]

-- That students can satisfy the mandatory attendance requirement attached to the SST period by participating in a religious student club (or any other approved student club), Pet. at 8-11, is no more a concern than the fact that students can satisfy state truancy laws in general by attending private religious schools (or any other approved nonpublic school option).

-- That student club meetings during SST entail a faculty supervisor, Pet. at 11, creates no more of an Establishment Clause concern than that same faculty presence after school, *see Mergens*, 486 U.S. at 252-53.[6]

-- That ASB clubs are "official," *see* Pet. at 12, is no more an Establishment Clause concern here than in

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[5]Petitioners express concern about the "diversion" of school district resources to religious purposes. Pet. at 13-14. That issue relates to government provision of aid to private education, not to equal access to benefits made available to a spectrum of private actors. That "diversion" is not a grounds for denying equal access is illustrated, for example, by *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), which involved a blind student's "diversion" of state scholarship funds to his ministerial training program. This Court unanimously held that there was no Establishment Clause difficulty.

[6]Petitioners indulge in speculation about other non-club students being present at student religious meetings and about faculty supervisors enforcing germaneness in discussions at student religious meetings. Pet. at 8, 11. There is no record support for such claims. To the contrary, students are free to go to the library (or other available locations) if they wish, CR Tab 22, p. 78, and faculty can exercise the same valid supervisory role during SST as they do after school.

Mergens, where student clubs were also "official," *e.g.*, 496 U.S. at 247 ("respondents seek equal access in the form of official recognition by the school"); *id.* at 247-53 (plurality) (rejecting Establishment Clause objection to official recognition of Bible club).

-- That the Ninth Circuit addressed the question whether the ASB club program is a public forum or a nonpublic forum for free speech, Pet. App. 31a-33a, is immaterial. Viewpoint discrimination is unconstitutional regardless of the nature of the forum. *E.g.*, *Widmar*, 454 U.S. at 269-70 ("public forum"); *Good News*, 533 U.S. at 106-07 ("limited public forum"); *Lamb's Chapel*, 508 U.S. at 392-93 ("nonpublic forum"). Hence, petitioners' third Question Presented is moot, as is petitioners' discussion of the issue, Pet. at 15-18.

* * *

By recognizing that a student Bible club has, under the First Amendment, a right to the same access to school facilities and resources as other student noncurricular clubs such as Students Against Drunk Driving, the Hiking Club, and the Stock Market Club, Pet. at 17, the Ninth Circuit simply and correctly applied well-settled constitutional law. There is no cause for Supreme Court review.

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

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